No. 868

IN THE

Supreme Court of the United States

October Term, 1968

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FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO BRIEF AMICUS CURIAE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The brief *amicus curiae* of the Commonwealth of Massachusetts presents little more than a recitation of the alleged injury that would result to Massachusetts "nearby" producers by virtue of the denial of the petition for a writ of certiorari. In respect to the statistical data set forth by the *amicus curiae*, the respondents note that most of it is selective in nature and misleading by virtue of significant omissions of relevant facts or by reason of utilization of different terms on an interchangeable basis.

The brief states that there are 1,564 dairy *farms* in Massachusetts as of July 1, 1968, and that "all but a handful" are located within the nearby and intermediate zones of the Massachusetts–Rhode Island milk order. However, the official reports of the Market Administrator for said milk order for July 1, 1968, reflects that there are only 1,233 Massachusetts *producers* serving the Massachusetts–Rhode Island market, and the number of dairy *farms* would presumably be less by reason of the fact that some dairy farms are run by more than one individual producer. It is evident that those Massachusetts producers who do not market under the federal order are not affected by the escrowing of the respondents' monies, and the figure cited by the *amicus curiae* obviously includes farms that are not embraced under the order. The cited figure is off by at least 231 dairy farms, and their location within the nearby differential zone is of no significance if they are not covered under the federal order.

The *amicus curiae* then states that "since the escrow commenced, 296 *dairy* farmers have ceased operation, a 17 percent drop in the number of *farmers* in Massachusetts in the two-year period." No official source is cited for the data set forth, and the brief fails to state whether the 296 dairy farmers marketed under the federal order. There is no indication as to whether the 17 percent drop in "the number of farmers in Massachusetts" refers to dairy farmers or all farmers in Massachusetts. In any event, the reference of the *amicus curiae* to the 231 dairy farms as "a handful" would appear to be equally applicable to the 296 dairy farmers who have ceased operation in the two years that the respondents' monies have been escrowed.

The preliminary injunction and escrow order was entered on January 16, 1967, and the official figures from the Market Administrator's annual statistical reports discloses that there were 1,411 Massachusetts producers who

marketed under the order as of January 1, 1967. The same reports reflect that there were 1,664 Massachusetts producers under the order on January 1, 1965, and this would indicate a loss of 253 Massachusetts producers during the prior two-year period. As of January 1, 1969, there were 1,180 Massachusetts producers under the order, a drop of only 231 producers during the two-year period of the escrow account. The official reports thus show that fewer Massachusetts producers who marketed under the order left dairy farming during the two-year period of escrowing than in the prior two year period of 1965-1967, and the respondents respectfully submit that such fact evidences the lack of necessity for continued subsidization of nearby producers by the respondents. It also evidences that the contentions of the nearby producers must be closely scrutinized in order that a fair and accurate evaluation may be made thereof.

The brief *amicus curiae* next treats the nearby vs. non-nearby attrition rate in recent years, but it is noted that no supporting figures are provided for the general allegations made in the brief. The official reports are cited for the statement that, "in 1967 and 1968 after the escrowing of the net differential the nearby zone lost a large number of farms but the distant zone increased their number in 1967 and experienced only a negligible drop in 1968." However, an examination of the Market Administrator's reports cited by the *amicus curiae* discloses that there were 2,620 nearby producers under the milk order on January 1, 1965 and 2,198 such producers as of January 1, 1967, a drop of 422 nearby producers in the two-vear period prior to commencement of the escrowing of a part of respondents' minimum milk price. There were 1,985 nearby producers under the order on January 1, 1969, a drop of 213 in the two-year period of the escrow order. Again the official figures are at variance with the contentions of the *amicus curiae* and clearly demonstrate that nearby producers need not exact

the penalty payments from the respondents to stay in business.

Nor do the statements of the *amicus curiae* hold up when measured against the official reports in respect to the claim that there were more distant producers in 1968 than in 1966, the brief limiting its reference to the month of October in said years. When analyzed on a consistent basis, it is noted that there were 6,706 distant producers under the order on January 1, 1966 and only 6,451 on January 1, 1969, or at the end of 1968. Moreover, the distant producers decreased by 165 in 1968 in spite of an increase in their numbers that was attributable to an expansion of the order's coverage in December, 1967. The respondents respectfully submit that the contention of the *amicus curiae* that "the distant zone increased their number in 1967" is unfair by virtue of its failure to explain that this was not solely due to new dairy farms being started in the non-nearby area but also occurred as a result of the expansion of the order in 1967 to cover existing farms in areas that were not previously embraced by the federal order.[1]

The respondents further note that the brief *amicus curiae* omits the year 1966 entirely when setting forth the foregoing inaccurate and selective statistics. The same official reports of the market administrator discloses that there were 7,696 non-nearby dairy farmers under the order on January 1, 1965 and only 6,706 on January 1, 1966, a loss of almost one thousand distant producers in the first year following consolidation of the Greater

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[1] The expansion of the order in 1967 included additional nearby producers who had never received the nearby differential payments, but they would receive the respondents' escrowed monies under the petitioners' arguments that nearby producers have "relied" on such exactions from the respondents and by virtue of the "historical pricing patterns".

Boston order with the secondary market orders of Worcester, Springfield and Southeastern New England.[2] The nearby producers under the order decreased by but 299 during the same period, and they sustained a reduction of only 223 nearby producers in 1966 as compared to a loss of 485 non-nearby producers in that year. The omissions of the brief *amicus curiae* are thus not mere happenstance, and virtually every statement and statistic cited in the brief is at variance with the facts or misleading in nature by virtue of such omissions or interchange of apparently identical but completely different identifying terminology. The same tactic has prevailed throughout this litigation in the lower courts, the respondents being forced to spend an inordinate amount of time in rectifying such misleading material.

The brief *amicus curiae* also refers to average income figures for either dairy farmers or all farmers in the Northeast United States, the exact reference not being fully identified in the brief. The reference would include non-nearby dairy farmers in any event, and their smaller incomes would necessarily reduce the overall average figure and render it inapplicable to the larger nearby producer. Significantly, the brief acknowledges the larger size of the average nearby producer's operation when it cites

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[2] On January 1, 1964, prior to consolidation of the milk orders on Oct. 1, 1964, there were 692 nearby producers and 7,317 non-nearby producers under the Greater Boston order, and only 67.9% of the nearby milk was assigned to Class I use. The percentages were higher for all zones out to the middle of the milk shed, varying from 79.1% in zones 9-15, 84.1% in zones 16-17, 70.7% in zone 18, and 90.5% in zones 19-20 of the milkshed or 200 miles from Boston. In January, 1965, after consolidation of the orders, the non-nearby producers numbered 7,696, but the nearby producers jumped to 2,620 and increased the nearby differential payments over four-fold. Many non-nearby producers were forced out of business the following year.

the increase in the size of their herds in the last ten years. This clearly indicates that nearby producers are able to sell their herds to other nearby producers when they decide to sell their land at huge profits for housing developments or other commercial purposes.[3] This citation would also indicate that there is little overall impact on the Massachusetts dairy business when nearby producers do sell their farms and their cows. Under these circumstances, the statistical data cited by the *amicus curiae* as to attrition in the number of nearby producers or farms has little real meaning or significance.

Moreover, the respondents respectfully submit that the income data quoted by the *amicus curiae* is obviously unrealistic, and that the inclusion of the affidavit of Reuben Hall and the eighteen dairy farmers in the same reference serves only to emphasize such fact. In fact, the proffer of the latter affidavits, some of which were not notarized,

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[3] "I, Herman L. Sparrow, have for fourteen years owned and operated a dairy farm in the town of Northboro, Worcester County, Massachusetts, which has been in my family since 1900 and on which I produced 1,118,967 pounds of milk during 1966 which was sold to a handler regulated under the Massachusetts–Rhode Island federal milk order. My income from the farm operation for this year was about $74,000 and my expenses for the year amounted to about $72,100 without allowing for any return on approximately $27,000 of new capital invested in the business. Net return for my labor and management above expenses was therefore $1,900 and allowance for five percent return on capital invested would reduce this figure to $550. Without the $.46 per hundredweight differential payment I now receive, my gross income would have been $5,147.40 less in 1966, and I would have begun to seriously consider disposing of my property for a housing development. * * * ." Respondents submit that such affidavits are unrealistic, counsel proffering the same not assuming responsibility therefor even though he had notarized some of the same, and they further maintain that they should not have to subsidize such producers who could obtain a better return from a bank for their monies.

was without compliance with the rules as to service on opposing counsel at the appropriate time, the petitioners consistently refusing to serve such papers and motions until immediately before a hearing in order to prejudice the respondents' opportunity to question or defend against such matters. The record below also evidences the inaccuracy of many of the contentions made in the affidavit of Attorney Hall, and the respondents note that many of the statistics and citations set forth in the brief of the *amicus curiae* are identical to those set forth in the papers submitted by Attorney Hall below.[4]

The reference of the *amicus curiae* to the alleged reliance of nearby producers on continued receipt of such illegal exactions from respondents is an obviously unsound and inequitable argument. One could argue with equal force that the increased costs of necessary supplies should be borne only by non-nearby producers because the nearby producers had not anticipated such increased costs. The nearby Rhode Island producers might argue that they need such nearby differential payments because of anticipated institution of a state income tax in Rhode Island. Even an individual who had been embezzling monies from his employer over a long period of time could argue that he should continue to receive such monies because of reliance thereon and investments made upon such basis. But it must be remembered that non-nearby producers go out of business and simply bear the loss of their vocation and investments. The fact that one's expected profit or return

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[4] The brief *amicus curiae* even refers to the respondents' escrowed monies as the "net differentials", the same terminology being used below to divert attention from the fact that such escrowed monies emanate solely from the respondents' milk price and are attributable to the marketings of their milk during the escrow period. Records are being kept of such marketings by the Market Administrator, and the nearby producers currently receive the full uniform price for their milk without escrowing, the sums attributable to their marketings which were in escrow having previously been returned to them at the suggestion of respondents.

is decreased, however, would not entitle one group of individuals in a particular field of endeavor to claim that the unexpected lower profit or return should be covered by a forced payment from their fellow workers or investors. Nor should this reasoning apply to require an extra profit or return to certain preferred producers, particularly from out of the pockets of the smaller dairy farmers. This is neither good Government nor sound economics. It creates illegal discrimination among dairymen and leads to disorderly marketing.

Moreover, the total lack of merit in the fallacious "reliance" argument is illustrated by the testimony of nearby producers in the *Cranston* trial, and said testimony evidences that such arguments do not usually originate with dairy farmers. One nearby producer testified in that case that he had relied on such differential payments in making an investment of $107,000 and another stated that he had relied on such payments of 46-cents per hundredweight (or almost $5,000 annually) in incurring indebtedness that required payments of about $1,000 per month. These nearby producers stated that they were receiving nearby differential payments of 46-cents per cwt. under the Connecticut milk order, but the differential in that order returns them only but about 2-cents per cwt. or an average of $12.50 per month over the uniform price in the absence of such differential. They testified that the CMPA economist had instructed them concerning the nearby differential payments, and the lack of merit in the argument concerning "reliance" on the nearby differential payments in making investments, etc., becomes painfully evident when it is realized that this same argument was even made in respect to the 2-cents nearby differential of the Connecticut order. Additionally, other "nearby" producers all across the United States are able to exist without such subsidies in making their investments. Nevertheless, the *Cranston* trial devotes page after page to such inaccurate testimony that only serves

to illustrate that most nearby producers did not even know they were receiving such a differential payment. Most nearby dairymen would not be in favor of exacting such payments from their smaller fellow dairymen, and some nearby Massachusetts producers actually signed a petition stating that they favored elimination of the differential.[5]

The other contentions of the *amicus curiae* reflects an unfamiliarity with the record below and issues in the case. The district court held many hearings over a period of six months, and it gave exhaustive consideration to the arguments presented by the Secretary and the nearby

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5 "We, the undersigned producers, do not want the Allen-Freeman case appealed to the Supreme Court for the following reasons: 1. Appealing this case will result in many more months of litigation and escrowing of differential funds. 2. An appeal could prevent the immediate disbursement of the escrow fund. 3. Appealing this case will result in a cross-appeal of that part of the court's decision that awarded a portion of the escrow fund to nearby producers, therefore it is possible that we might lose this share. 4. Even though we stand to lose financially by losing this case, we feel that nearby differentials should be ruled invalid. In our opinion, all producers should be working in harmony for a higher uniform price. If nearby milk is more valuable than distant milk, the handler or dealer should pay the premium, not the distant milk producer. 5. The eight producer intervenors have no right to appeal or request a stay in this case without consulting all nearby producers. They are jeopardizing our share of the escrow fund and would appear subject to legal action. 6. We feel that many more nearby producers would join our cause if they were informed that the case is going to be appealed." (Respondents previously advised that they would not seek certiorari of the lower court's award of part of their monies to the nearby producers if no further proceedings were had, in that the present need of non-nearby producers for such monies outweighed the future receipt of all of their monies through a time-consuming petition for a writ of certiorari. They petitioned this Court only after the nearby producers did so, and they now seek full relief because of the additional injury occasioned by delay in disbursement of their monies).

producers who applied for intervention. The courts below simply rejected the illogical contentions concerning Attorney Hall constituting the Congress of the United States in respect to legislative intent, and it also rejected the equally illogical contention that an isolated and ambiguous colloquy between two Congressmen should be interpreted by the court in such manner as to prevail over the language of the Act, the specific language in the Senate and House reports, the testimony in the administrative records, and other relevant material. Moreover, the testimony presented in *Cranston* was nothing more than a third relitigation of the same contentions that nearby producers' counsel have been making since 1965, and it led to a decision that is patently erroneous, the district court in that case failing to note that the "market differential" defined in the Congressional reports exists in the Connecticut milk order and had existed in the very area in which the district court was located. (See App. C, pp. 21-23c). The *Cranston* district court also accepted the testimony of Attorney Hall that varied from the testimony in the administrative record (App. C, pp. 24-30c), and it accepted the testimony of another witness as controlling when his testimony is contradicted by the very document that his testimony was based upon, said document not being produced at the trial because of such fact. (App. C, pp. 12-21c). Other than the minimal testimony of 4 non-nearby producers and 3 nearby producers, the only witnesses were the two aforesaid individuals, 2 CMPA officials who had previously testified in administrative proceedings, and USDA personnel who had full opportunity to present their testimony in this case.[6] Instead, they even refused to furnish certain administrative records

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[6] A Connecticut bank official initially testified concerning loans made to nearby farmers on the basis of the differential, but he admitted that he would have made such loans in any event when he realized that the Connecticut nearby differential did not return 46-cents but only 2 or 3 cents.

to the district court below after respondents furnished the court with detailed summaries thereof that reflected testimony adverse to the petitioners' arguments.

The 7 nearby producers were given repeated opportunities to present any argument for the district court's consideration, and respondents even furnished them with administrative record references when petitioners intentionally sought delay on that ground. Petitioners still continue to argue denial of intervention after choosing to prosecute an appeal from the district court's judgment and refusing the opportunity to prosecute their appeal concerning denial of intervention. Respondents submit that this is totally improper and that petitioners desire the better part of two worlds at respondents' expense without even showing any basis therefor.

The only other contention made in the brief *amicus curiae* is also lacking in merit, in that another selective reference is made to the year 1967 in respect to "evening out production", a phrase that obviously has many meanings. The accuracy of such figure is irrelevant in any event, even if attributable to the expansion of the coverage of the order in that year, since the nearby producer is already compensated for such factor under the seasonal incentive plan that rewards even producers. It is inequitable to contend that a producer should be compensated twice for the same factor, and it is also inequitable to imply that such factor is not already compensated for in contending that further proceedings are necessary for such reason. The same inequity is apparent in respect to the nearby differential payments, since nearby producers are already compensated under the zone differential of the milk order for any possible location value of their milk. 7 C.F.R. 1001.62. The petitioners or *amicus curiae* do not even suggest a plausible or proper basis for any further proceedings of any nature, and the other contentions made in the brief *amicus curiae* of the Commonwealth

of Massachusetts are either too lacking in substance to merit a reply or are treated in the other briefs filed by the respondents herein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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